THE SOCIAL AND ECONOMIC INTERPRETATION OF THE FOURTEENTH AMENDMENT*

FOR those who love precision and definiteness the question of the application of the Fourteenth Amendment to social and economic problems remains an irritating enigma. The judicial construction of due process of law and the equal protection of the law has from the first discouraged systematic analysis and defied synthesis. More than one writer has emerged from the study of the problem with a neat and compact set of fundamental principles, only to have the Supreme Court discourteously ignore them in its next case. But paradoxical as it may seem, those who long for a wise and forward-looking solution of modern social and economic problems may well rejoice that the application of the Fourteenth Amendment to those problems has, for the most part, been halting, changeable, chaotic, and conflicting. The process of trial and error by which a social and economic interpretation of that amendment is still being evolved has had certain very wholesome results. It has prevented the petrifaction in our law of the earlier individualistic doctrines of due process and equal protection of the law. At the same time it has left the way open for the courts to correct by the increased wisdom of the future the possible mistakes of the present, and to adjust the limitations of the Fourteenth Amendment to social and economic problems which are of necessity shifting and complex.[1] The present paper aims to discuss one phase of this trial and error process.

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[1] "Extreme indefiniteness, however, appears in the light of a wise avoidance of irrevocable conclusions, if we apply to this phase of constitutional law as a whole the test of political performance. The greatest defects of the decisions from a legal standpoint constitute their saving grace. No constitutional right is asserted without placing in convenient juxtaposition a saving on behalf of the public welfare. No rule has been formulated in such a manner as to embarrass an honorable retreat, and if an inconvenient precedent is encountered there is little hesitation in overruling it. * * *" FREUND, STANDARDS OF AMERICAN LEGISLATION, 211. See also Freund, Constitutional Limitations and Labor Legislation, 4 ILL. L. REV. 623.

For the purpose of the present discussion the problem of the social and economic interpretation of the Fourteenth Amendment may be stated somewhat as follows: In passing social and economic legislation the legislature very commonly subjects the individual to some form of compulsion or restraint in order to promote the community welfare.[2] The power to do this, which we call the police power, together with the powers of taxation and eminent domain, are limited by the clauses of the Fourteenth Amendment which forbid the taking of "life, liberty or property without due process of law" or the denial of "the equal protection of the law." While neither of these clauses can be defined in a clean-cut manner, it may be said that the due process clause forbids social legislation which is arbitrary; that is, legislation which restricts individual liberty or property rights more severely than the advantages to the community can possibly justify.[3] The equal protection of the law, on the other hand, means protection against arbitrary discrimination or class legislation.[4] The whole problem of the application of the Fourteenth Amendment to social legislation is bound up in the practical construction which the courts give to the term "arbitrary." Now, whether or not a workman's compensation act or a minimum wage law is "arbitrary" is quite largely a question of opinion. On this question of opinion the legislature in enacting the law has the first word, while the courts in deciding whether the law is constitutional have the last word.[5] And one of the delicate questions which the courts have had to face is this: in deciding whether a piece of social legislation violates due process of law or the equal protection of the law, how much weight ought a court to give to

[2] Freund characterizes the police power as follows: "It aims directly to secure and promote the public welfare, and it does so by restraint and compulsion." POLICE POWER, § 3.

[3] Typical statements of this well-settled rule may be found in the following cases: Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561 (1906); Dobbins v. Los Angeles, 195 U. S. 223 (1904); Jacobson v. Massachusetts, 197 U. S. 11 (1905); Price v. Illinois, 238 U. S. 446 (1915). See 12 CORPUS JURIS, 931, and cases cited.

[4] Gulf C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150 (1897); Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (1902); Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 (1911); also HALL, CONSTITUTIONAL LAW, § 143.

[5] For a clear statement of this rule see Mugler v. Kansas, 123 U. S. 623, 666 (1887).

the formally pronounced opinion of the legislature that the act in question is not arbitrary but is amply justified by existing social needs? The judicial attitude toward this question has undergone some very interesting changes during the fifty years which have elapsed since the Fourteenth Amendment was adopted. The writer believes that it has passed through three distinct phases, and is on the verge of entering upon a fourth. It is the purpose of this paper to trace these changes and to indicate the significance of each.

I. Period of Judicial Non-interference—Early View that Fourteenth Amendment does not Limit States in Exercise of Police Power

The first position which the courts assumed in construing the Fourteenth Amendment had the great advantage of being simple and definite, and it does not therefore require extended comment. So far as it relates to our present problem, it may be summarized thus: whatever new guaranties were created by the amendment were created for the benefit of the newly freed black man and were inapplicable to exercises of legislative power which did not involve racial oppression or discrimination.[6] This doctrine was clearly announced by Mr. Justice Miller in the *Slaughter House* cases,[7] in which he expressed his belief that the amendment would never be applied except to cases involving the rights of freedmen. It was even more strikingly expressed in the *Granger* cases, of which *Munn* v. *Illinois* is the most important, in which the court declared that the due process clause afforded no protection against an unreasonable regulation by the legislature of public utility rates. "For protection against abuses by the legislatures," runs the opinion of Chief Justice Waite, "the people must resort to the polls, not to the

[6] The early history and construction of the Fourteenth Amendment is discussed in a scholarly article by Professor Corwin, The Supreme Court and the Fourteenth Amendment, 7 Mich. L. Rev. 643. The writer has drawn heavily upon this article.

[7] "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision [equal protection of the law clause]. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other." 16 Wall. 36, 81 (1876).

courts."[8] And while this was *dictum* so far as the *Munn* case was concerned, it seems to represent the views of a majority of the court for upwards of a decade. We also find Mr. Justice Miller, who had written the opinion of the majority in the *Slaughter House* cases, complaining in a still later decision of the existence of "some strange misconception" as to the scope of the due process clause which causes it to be regarded "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."[9] And even more significant is the fact that in the case of *Loan Association* v. *Topeka*[10] the court held that a state tax levied for a private purpose was unconstitutional, not because it violated the guarantee of due process of law, but because it contravened those limitations upon legislative power "which grow out of the nature of all free governments," and which the court called "reservations of individual rights, without which the social compact could not exist."[11] In other words, the court invalidated the statute without pointing to any constitutional clause with which it was in conflict, apparently without even considering the possibility of finding in the due process clause of the newly adopted Fourteenth Amendment a positive and specific prohibition against such legislation.[12]

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[8] Munn v. Illinois, 94 U. S. 113, 134 (1876). Compare Mr. Justice Harlan's statement in Powell v. Pennsylvania, 127 U. S. 678, 686, decided in 1887: "If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary."

[9] Davidson v. New Orleans, 96 U. S. 97, 104 (1878).

[10] 20 Wall. 655 (1875).

[11] Some writers have assumed that this case rested upon the basis of the due process clause. A careful reading of the case will show that this is not correct. Professor Corwin explains this on the ground that since the Supreme Court took jurisdiction in the case upon the ground of diversity of citizenship it was not necessary for it to consider the federal question of a possible violation of due process of law. See Corwin, *op. cit.*, 7 MICH. L. REV. 654.

[12] It is interesting that the courts in later decisions have generally preferred to rest the prohibition against taxation for a private purpose upon

It may be said, then, that the Supreme Court began its interpretation of the Fourteenth Amendment by announcing and applying the doctrine of judicial non-interference with social and economic legislation. The amendment was held to give the court no authority to examine or revise the determinations of the legislature that social and economic conditions justify statutory interference with individual liberty. That determination was conclusive.[13]

II. The Period of Judicial Ruthlessness—Mechanical and Legalistic Interpretation of Fourteenth Amendment

In adopting the doctrine of judicial non-interference just described, the Supreme Court thoughtfully safeguarded its future peace of mind by refusing to give any authoritative definition of due process of law or equal protection of the law. The meaning of these clauses, said the court, would have to be evolved by the process of judicial inclusion and exclusion.[14] The way was thus discreetly left open for a change in the judicial construction of the Fourteenth Amendment, and it was only a matter of a few years before that change had taken place; and by the middle eighties we find the courts standing openly and triumphantly for the doctrine that the Fourteenth

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the authority of Loan Association v. Topeka, *supra*, and the doctrine of "fundamental principles" therein set forth, rather than to place it squarely upon the ground of due process. See the careful study by McBain, Taxation for a Private Purpose, 29 Pol. Sci. Quart. 185. That the rule now rests upon the due process clause, however, seems to be clear from the language of the Supreme Court in Fallbrook Irrigation District v. Bradley, 164 U. S. 112 (1897); Jones v. Portland, 245 U. S. 217 (1917); Green v. Frazier, 253 U. S. 233 (1920).

[13] It may be noted that the first American case involving the validity of a legislative restriction on women's hours of labor was decided in 1876, Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383. The law was sustained. Nothing was said about the Fourteenth Amendment, and it seems clear that it did not occur to anyone that its restrictions had any bearing on the problem.

[14] "But apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." Davidson v. New Orleans, 96 U. S. 97, 104 (1878).

Amendment imposes judically enforceable restrictions upon social legislation.[15]

It was probably inevitable that the judicial attitude toward the interpretation of the Fourteenth Amendment should change. It is certainly not difficult to explain why it did so. In the first place, the Supreme Court itself underwent a thoroughgoing change in personnel. Five new justices took their seats between 1875 and 1885.[16] When Mr. Justice Miller died in 1890 he left behind him on the bench but one colleague who had sat with him in the *Slaughter House* cases, and that colleague, Mr. Justice Field, had from the outset been an outspoken and dogmatic apostle of the new faith.[17] This fact need not be over-emphasized, but it is not entirely without significance that a majority of the court was by then made up of justices whose service on the Supreme Court had begun after the close of the Civil War. This perhaps suggests a second reason for the change in judicial attitude under discussion; the fact that with the gradual adjustment of the problems of reconstruction, both political and constitutional, the immediate post bellum conditions which had stimulated the adoption of the Fourteenth Amendment became less vivid in men's minds and ceased to present so strong an argument against a broad and general application of the clauses of that amendment.[18] There is to be taken into account, in the third place, a more or less continuous pressure brought to bear upon the court by the bar and by interests desiring protection against unwelcome legislative interference, to adopt a broader interpretation of due process of law. Mr. Justice Miller's lecture to the legal pro-

[15] This development is clearly traced by Professor Corwin, *op. cit.*, 7 MICH. L. REV. 643. See BEARD, CONTEMPORARY AMERICAN HISTORY, Ch. III, entitled "The Revolution in Politics and Law."

[16] These were Justices Harlan, Woods, Matthews, Gray, and Blatchford.

[17] See the vigorous dissent of Mr. Justice Field in the Slaughter House cases, *supra*, in which he urged that the Fourteenth Amendment guaranteed to citizens of the United States the fundamental rights belonging to the citizens of all free governments.

[18] Professor Corwin suggests that the fear which the court had originally felt that under the Fourteenth Amendment congressional legislation would be substituted for state legislation after the fashion of the Civil Rights Act had by this time been eliminated by the decisions invalidating the last of those acts, *op. cit.*, 7 MICH. L. REV. 656.

fession on this point in the case above referred to[19] seems to have had no effect. Counsel seeking relief for their clients continued to urge that the due process clause ought reasonably to be construed so as to afford protection against arbitrary and unreasonable exercises of legislative power. They were also able to bring evidence to the attention of the court that its original view of the intentions of the framers of the amendment was not historically sound and that the guaranties of the Fourteenth Amendment had really been designed for the protection of private rights of liberty and property generally and not exclusively for the protection of the negro.[20] And finally, as the movement for the regulation of public utility rates continued, and as the newer movement for protective social and labor legislation set in, a court which in 1875 was willing in the *Loan Association* case to nullify a state law on no stated constitutional grounds, but on an alleged violation of natural rights, could hardly be expected to stand pat on the rather indiscreet *dictum* in the *Munn* case that for "protection of abuses of legislative power the people must resort to the polls, not to the courts."

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[19] *Supra*, p. 739.

[20] In 1882, in arguing the case of San Mateo County v. Southern Pac. R. Co., 116 U. S. 138 (1885), before the Supreme Court, Mr. Roscoe Conkling, who had been a member of the Committee of Fifteen on Reconstruction which had drafted the Fourteenth Amendment, produced in court the unpublished journal of the committee to support his contention that the amendment had not been originally intended for the exclusive protection of the negro race. See TAYLOR, DUE PROCESS OF LAW, 32. This journal has been published with critical comments. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39th Congress, 1865-1867, Columbia University Studies in History, Economics and Public Law, Vol. 62. For an analysis of the intentions of Congress in passing the Fourteenth Amendment see FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT; *passim*, also Corwin, *op. cit.*, 7 MICH. L. REV. 643. In 1900 Mr. Justice Peckham, speaking for the court in Maxwell v. Dow, 176 U. S. 581, 591, referred to the narrow construction which had been given to the Fourteenth Amendment in the Slaughter House cases and said that the "suggestion that only discrimination by a state against the negroes as a class or on account of their race was covered by the amendment as to the equal protection of the laws has not been affirmed by the later cases. * * * That the primary reason for that amendment was to secure the full enjoyment of liberty to the colored race is not denied, yet it is not restricted to that purpose, and it applies to everyone, white or black, that comes within its provisions."

Even a casual examination of this new judicial attitude will indicate how thoroughgoing a revolution it wrought in our constitutional law. This new doctrine involved two things. First, it imposed upon the courts a new duty, the duty of applying to social legislation the limitations of due process of law and equal protection of the law. Secondly, this duty made it necessary for the courts to determine just how the guaranties of due process and equal protection of the law could be used as yardsticks for measuring the validity of social legislation. It is interesting and instructive to see how the courts approached this problem.

It must be borne in mind that at this time it was the recognized theory of the judicial function that courts do not *make* law, they merely *find* or *discover* law.[21] Mr. Morris R. Cohen has called this the "phonograph" theory of judicial construction, in which the judge is merely a vocal medium through which the preëxisting legal principles are given expression.[22] These principles are absolute and immutable and the judge has no responsibility for them except to see that they are applied in pertinent cases. But in applying the Fourteenth Amendment to social legislation the task was not so simple as the theory. There were no principles of law to be discovered. The guaranties of due process and equal protection of the law had never been applied as restrictions upon the general

[21] This theory is critically treated in GRAY, THE NATURE AND SOURCES OF THE LAW, Ch. IV. See also Carter, The Ideal and the Actual in the Law, 24 AMER. L. REV. 752, as well as his "LAW, ITS ORIGIN, GROWTH AND FUNCTION." Dean Pound has given us the following graphic statement of the theory: "A German writer has put the received theory thus: The court is an automaton, a sort of judicial slot machine. The necessary machinery has been provided in advance by legislation or by received legal principles; and one has but to put in the facts above and draw out the decision below. True, he says, the facts do not always fit the machinery, and hence we may have to thump and joggle the machinery a bit in order to get anything out. But even in extreme cases of this departure from the purely automatic, the decision is attributed, not at all to the thumping and joggling process, but solely to the machine." Courts and Legislation, 7 AMER. POL. SCI. REV. 361, 364.

[22] The Process of Judicial Legislation, 48 AMER. L. REV. 161, 164. Compare with this early rigid conception of law Mr. Justice Holmes' interesting suggestion that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law." COLLECTED LEGAL PAPERS, 173.

legislative power of the states. Equal protection of the law was a brand new guarantee so far as the federal Constitution was concerned;[23] and due process of law had been limited in its previous construction to matters of law enforcement, procedure, and racial oppression.[24] Now what does a court do when it has to "find" law where there is none? Naturally, but without undue publicity, it draws upon its own ideas as to what the absolute, eternal, and immutable principles of law ought to be with reference to the case in question. And this is exactly what the courts did in applying the Fourteenth Amendment to social and economic legislation during this period of judical self-assertion. They read into the phrases "due process of law" and "equal protection of the law" the meaning derived from their own training and intellectual background. They translated the clauses in question into the terms of the economic doctrine and the political and juridical philosophy which had served the vastly simpler speculative needs of the pioneer society of the forties and fifties. We may pause for a moment to consider what this meant concretely.[25]

In the first place, it meant the application of a *laissez faire* doc-

[23] The federal Bill of Rights contains no guarantee of the equal protection of the law. Since the adoption of the Fourteenth Amendment, however, there has been a tendency upon the part of the courts to regard the due process clause and the equal protection of the law clause as overlapping to a large extent. As one authority puts it, "the broad interpretation which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection." WILLOUGHBY ON CONSTITUTION, II, 874. See also Chief Justice Taft's discussion of this point in the recent case of Truax v. Corrigan, Adv. Opin., Oct. Term, 1921, 132, 138.

[24] Corwin, *op. cit.*, 7 MICH. L. REV. 643. For a careful study of the narrow application given to the due process clause of the Fifth Amendment see Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 HARV. L. REV. 366, 460.

[25] POUND, THE SPIRIT OF THE COMMON LAW, Chapters IV and VI. See Mr. Justice Holmes' celebrated dissent in Lochner v. New York, 198 U. S. 45, 75 (1905): "This case is decided upon an economic theory. which a large part of the country does not entertain. * * * The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics * * * a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."

trine to the problem of the nature and extent of the legislative regulation of businesses affected with a public interest, and the problem of what the public purposes are for which property may be taken by eminent domain. There is no space for detail, but merely for an illustration or two. The doctrine of *Munn* v. *Illinois,* already stated [26] was by gradual steps modified and finally discarded,[27] and in its place we have the declaration by the Supreme Court that a legislative regulation of public utility rates amounts to a deprivation of property without due process of law if it does not allow a return on the capital investment of at least six per cent.[28] We find the public uses for which alone, under due process of law, private property might be taken by eminent domain limited in meaning in the main to be synonymous with "use by the public," a doctrine which placed legislative discretion almost at the vanishing point.[29]

In the second place, in applying the Fourteenth Amendment to the legislative exercises of the police power, the courts again evolved principles of law which embody a pronounced individualism. The quintessence of this individualism is to be found in the well-known doctrine of "liberty of contract," in terms of which the due process clause began to be construed in the state courts in the later eighties.[30] This doctrine of liberty of contract had great plausibility. It asserted in substance that when two parties came together to reach an agreement that was not contrary to public policy the legislature

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[26] *Supra,* p. 739.

[27] This interesting development is traced by Corwin, The Supreme Court and the Fourteenth Amendment, 7 MICH. L. REV. 643. See also BEARD, CONTEMPORARY AMERICAN HISTORY, 67-87.

[28] Willcox v. Consolidated Gas Co., 212 U. S. 19 (1909).

[29] The rule that private property may be taken by eminent domain only for a public purpose was not definitely subsumed under the guarantee of due process of law until the decision in Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226 (1896). For the early development of the rule see McBain, Taxation for a Private Purpose, 29 POL. SCI. QUART. 185, 187, and note. For discussion of the "use by the public" rule in the law of eminent domain see LEWIS, EMINENT DOMAIN, Ch. VII.

[30] The doctrine seems first to have been announced in Godcharles v. Wigeman, 113 Pa. St. 431 (1886), and Millett v. People, 117 Ill. 294 (1886). For elaborate discussion of the doctrine see Pound, Liberty of Contract, 18 YALE L. JOUR. 454; also FOSTER, LIBERTY OF CONTRACT AND LABOR LAWS.

had no right to interfere and to dictate the terms of that agreement or the conditions under which it should be made or carried out. The concept of individual liberty which provided the philosophical basis of this doctrine had formed the essence of radicalism a century before; and the jurists of this period, having gulped down Sir Henry Maine's dogma that "the movement of the progressive societies has hitherto been a movement from status to contract,"[31] regarded themselves as the apostles of a liberal faith.[32] It was only by the relentless application of the doctrine of liberty of contract that the fruits of progress could be saved from the onslaughts of reaction. Wholesome as that doctrine undoubtedly was and is in certain aspects and applied in certain situations, the juristic application of it during this period produced some very startling results. Applied concretely, it came to mean that the legislature had no more power to control the contract of employment between the Pennsylvania Railroad and one of its switchmen than to control the contract of sale between two farmers haggling over the price of a cow. It meant that the state could not disturb the sacred right of an adult woman to work "at any time of the day that suits her"[33] or as many hours during the day and night as she might wish.[34] In short, this liberty of contract doctrine raised an almost insuperable barrier

[31] MAINE, THE ANCIENT LAW [Pollock's Ed.], 165. For criticism of this application of Maine's theory see POUND, THE SPIRIT OF THE COMMON LAW, 28.

[32] A most interesting expression of this point of view occurs in the Preface to the Second Edition of GRAY'S RESTRAINTS ON THE ALIENATION OF PROPERTY (1895), in which, in protesting against the doctrine of spendthrift trusts, the author writes: "Now things are changed. There is a strong and increasing feeling, which has already led to many practical results, that a main object of the law is not to secure liberty of contract, but to restrain it, in the interest, or supposed interest, of the weaker, or supposed weaker, against the stronger, or supposed stronger, portion of the community. Hence, for instance, laws enacted or contemplated for eight hours' labor, for weekly payments of wages by corporations, for 'compulsory arbitration,' etc., that is, laws intended to take away from certain classes of the community, for their supposed good, their liberty of action and their power of contract; in other words, *attempts to bring society back to an organization founded on status and not upon contract.*" (Writer's italics.)

[33] People v. Williams, 189 N. Y. 131 (1907).

[34] Ritchie v. People, 155 Ill. 98 (1895).

against what seem now the mildest forms of protective labor legislation.[35]

The guarantee of the equal protection of the law, on the other hand, received an equally individualistic interpretation, borrowed from the common law. That interpretation did not deny the validity of all class legislation enacted in the exercise of the police power, but it recognized the propriety of only one classification, that based upon the common law distinction between persons who are *sui juris* and those who are not.[36] This meant, in substance, that social or economic legislation must treat alike all persons except infants, lunatics, wards, or those under some other definite legal disability. Here, of course, is the key to the refusal of the courts during this period to allow the legislatures to accord special protection to women in industry.[37] Here is also to be found the underlying philosophy of the following typical judicial utterance invalidating a legislative regulation of the time and method of wage payment in certain industries:[38] "The workingman of intelligence is treated as an imbecile. Being over 21 years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind, and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work sixty days and take the horse in payment." By this rigid and legalistic construction of the requirements of equal protection of the law the courts invalidated long lists of police regulations designed to improve the conditions prevailing in particular industries or to benefit particular classes.

Now in applying these doctrines, what respect did the courts accord to the opinion of the legislature, embodied in statutes, that prevailing social and economic conditions justified and demanded one of the forms of social legislation above mentioned? That respect was certainly scant.[39] The attitude assumed by the courts

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[35] Pound, Liberty of Contract, 18 YALE L. JOUR. 454. For elaborate citation of cases see FOSTER, LIBERTY OF CONTRACT AND LABOR LAWS, *passim*.

[36] Corwin, *op. cit.*, 7 MICH. L. REV. 664. Seager, The Attitude of American Courts Toward Restrictive Labor Laws, 19 POL. SCI. QUART. 589.

[37] Ritchie v. People, and People v. Williams, *supra*.

[38] Johnson v. Goodyear Mining Co., 127 Cal. 4, 11 (1899).

[39] Sir Frederick Pollock criticises the decision of the Supreme Court in the Lochner case, *supra*, upon this ground: "The legal weakness of this

toward such legislation was usually one of suspicion, not infrequently one of open hostility,[40] and almost invariably one which placed upon the shoulders of those defending the legislation the burden of proving it to be constitutional.[41] The time-honored doctrine that laws are presumed to be valid until proved beyond all reasonable doubt to be otherwise seemed to be forgotten or ignored.[42] The courts admitted

reasoning, if we may say so, is that no credit seems to be given to the state legislature for knowing its own business, and it is treated like an inferior court which has to give affirmative proof of its competence." The New York Labour Law and the Fourteenth Amendment, 21 LAW QUART REV. 211.

[40] "When it is sought, under the guise of a labor law, arbitrarily, as here, to prevent an adult female citizen from working at any time of the day that suits her, I think it is time to call a halt. * * * The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens, is becoming a marked one in this country, and it behooves the courts firmly and fearlessly to interpose the barriers of their judgments when invoked to protect against legislative acts plainly transcending the powers conferred by the Constitution upon the legislative body." People v. Williams, 189 N. Y. 131, 135 (1907).

[41] "There is no reasonable ground—at least none which has been made manifest to us in arguments of counsel—for fixing upon eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she work, injury will necessarily follow." Ritchie v. People, 155 Ill. 98, 114 (1895). "When a health law is challenged as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has, at least in fact, some relation to public health, and that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. * * * It cannot be perceived how the cigarmaker is to be improved in his health or morals by forcing him from his home and its hallowed associations and beneficent influences, to ply his trade elsewhere." In re Jacobs, 98 N. Y. 98, 115 (1885). "To the common understanding the trade of a baker has never been regarded as an unhealthy one." Lochner v. New York, *supra,* at p. 59.

[42] For the nature and development of the doctrine of reasonable doubt see the writer's paper, Constitutional Decisions by a Bare Majority of the Court, 19 MICH. L. REV. 771. It is, of course, obvious that if the courts recognize the propriety of legislative classifications based only upon the distinction between those who are *sui juris* and those who are not, they have automatically created a presumption which shifts the burden of proof onto those who defend any other basis of classification. See Corwin, *op. cit.,* 7 MICH. L. REV. 666.

"Where any doubt as to the constitutionality of such statutes could find lodgment, courts all too frequently declared the acts void." Brandeis, The Living Law, 10 ILL. L. REV. 461, 464.

that there were cases in which liberty of contract or other private rights might be restricted by police legislation without violating the Fourteenth Amendment, but they demanded that a positive justification for each new restriction should be clearly made out. And withal, they assumed in many cases an attitude very like that of the belligerent Irishman who announced to his friend, "I am open to conviction, but show me the man who can convince me."

That the burden of proof in respect to constitutionality should be thus shifted onto the shoulders of the proponents of social and economic legislation was highly important; but it was even more important that the burden of proof could be assumed, not by the presentation of evidence as to actual social and economic conditions, but rather by the citing of precedents and the matching of legal arguments. The idea that the validity of a police regulation might really depend upon whether certain social or economic needs did or did not exist was quite abhorrent to the judicial mind. Thus, in the *Ives* case the New York Court of Appeals ruled out the evidence presented to show that an employer's liability act was a legitimate exercise of the police power.[43] It said:

> "The report of the Commission is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally and legally unsound. Under our form of government, however, courts must regard all economic, philosophical and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written constitutions. * * * In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but the courts are not permitted to forget that law is the only chart by which the ship of state is to be guided."

In fact, in their mechanical and legalistic construction of the Fourteenth Amendment so little cognizance did the courts take of

[43] Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 287, 295 (1911).

the realities of modern life that we find a substantial group of cases in which protective labor laws are held invalid as imposing burdensome and arbitrary restrictions upon the very laborers themselves.[44] These opinions breathe forth judicial tenderness and concern for the unfortunate workingman, and with hearty enthusiasm the courts proceeded to rescue him from an attempted legislative oppression which, by subjecting him to the legal requirements of reasonable hours and conditions of labor, infringed thus brutally upon his sacred right of free contract.

It is not difficult to show that methods just described, by which the courts of this period applied the guarantees of the Fourteenth Amendment to social and economic questions, carried in their wake a whole brood of evils. In the first place, the reasonable and necessary legislative adjustment of pressing problems was unduly postponed by a series of reactionary decisions wholly out of keeping with the spirit of modern times. American states found themselves, temporarily at least, without power to correct social and economic ills which other self-respecting nations had long since ceased to tolerate. This in itself was unfortunate. Furthermore, these results led to a popular criticism and distrust of the courts which has been even more unfortunate. No one will deny that much of this criticism was ill-advised and that the layman frequently knew very little about the actual merits of the laws in question or the constitutional issues involved. What the layman did grasp was this: that the courts by the application of vague principles and abstract legal concepts managed to defeat the efforts of the legislature to correct social and economic evils which needed correction. He refused to be swindled by the very obvious fiction that the courts

[44] In re Jacobs, 98 N. Y. 98 (1885); Ritchie v. People, 115 Ill. 98 (1895); Godcharles v. Wigeman, 113 Pa. St. 431 (1886); In re Morgan, 26 Colo. 415 (1899); People v. Williams, 189 N. Y. 131 (1907). The Supreme Court, however, has not taken very kindly to the idea that employers may plead the wrongs of their employees as well as their own in attacking labor legislation. In Holden v. Hardy, 169 U. S. 366, 397 (1898), the court said that such an argument "would certainly come with better grace and greater cogency from the latter class." In a later decision the court declared bluntly, "The contention may be limited at the outset to the rights of the company. It cannot complain for its employees. * * *" Erie R. Co. v. Williams, 233 U. S. 685, 697 (1914).

were "finding" the law in these cases instead of "making" it;[45] and he soon lifted his voice in protest and came finally to demand such drastic measures as the recall of judges or decisions, or even the total abolition of the power of judicial review. The courts found themselves in the thick of social, economic, and political controversies, the objects of popular suspicion and hostility. The very principle of an independent judiciary came to be questioned.[46] The ugly results of this loss of popular confidence in the courts are not to be minimized by arguing that it was partially or even wholly undeserved. In an oft-quoted sentence Lord Herschell once declared that "Important as it was that the people should get justice, it was even more important that they should be made to see and feel that they were getting it";[47] and for practical purposes it is almost as

[45] "While the lawyer believes that the principles of law are absolute, eternal, and of universal validity, and that law is found, not made, the people believe no less firmly that it may be made and that they have the power to make it." Pound, Courts and Legislation, 7 AMER. POL. SCI. REV. 361, 375.

[46] It may not be irrelevant to suggest that the popular theory that judges directly responsible to the people through direct election will be more liberal in matters of constitutional construction does not seem to be borne out by the facts. Dean J. P. Hall has put this very clearly: "No elective courts exceed in liberality toward the legislature the United States Supreme Court or those of Massachusetts and New Jersey, and only a very few equal them. Appointive courts have rarely construed constitutions as narrowly as have the elected courts of Illinois, Indiana, Missouri, Washington, and West Virginia upon numerous occasions, and sometimes those of New York, California, and Colorado. In fact, so far as I can determine from a somewhat careful survey of the matter, the circumstance that judges have been elected or that they have been appointed cannot be shown to have had any appreciable direct bearing upon their decision of questions of constitutional policy. A judge of first-class ability is decidedly more likely to accord a rational freedom of choice to the legislature upon controverted points than is a judge of less ability, because, while all judges, from the very nature of their function, are likely to have a predominantly conservative cast of mind, that of the able judge is an intellectual conservatism, while that of his inferior has become instinctive, and what is novel naturally appears dangerous. The former is therefore more open to conviction, and as the appointive judges are, on the whole, somewhat superior in ability to the elected ones, they are therefore somewhat more liberal. This influence, however, is wholly indirect." The Selection, Tenure, and Retirement of Judges, Bulletin X of the American Judicature Society.

[47] Atlay, Victorian Chancellors, II, 460, quoted by Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605.

important today that the people should actually respect and trust the courts as that the courts should deserve that respect and trust. And finally, the somewhat arrogant attitude of the courts during this period resulted in a falling off of a wholesome sense of responsibility upon the part of our legislative bodies. The knowledge that the supreme court of the state would interpose a judicial barrier to the actual enforcement of legislation in questionable cases led many a legislature to build up its political fences by enacting legislation which was unconstitutional, and which was known by those who enacted it to be unconstitutional. The legislature reaped the credit of being progressive and responsive to the people's will; the court fell heir to the unpopularity resulting from declaring the legislation void. It will be a long and painful process to build up again the sturdy sense on the part of legislators that they must assume responsibility for the constitutionality of the laws they pass.

This second period or phase in the development of the social and economic interpretation of the Fourteenth Amendment may be characterized then as one in which the courts ruthlessly overrode the determinations of the legislature that social and economic conditions justified and demanded legislative regulation; and in so doing they relied almost exclusively upon abstract legal concepts and ruled out as irrelevant any consideration of social and economic facts.

III. Realistic Interpretation of the Fourteenth Amendment —The Courts as Social and Economic Experts

During the period just discussed we find the courts applying to the construction of the Fourteenth Amendment what Dean Pound has called "a jurisprudence of conceptions,"[48] under which social and economic questions were to be solved in accordance with abstract legal principles. In the period which began roughly about a dozen years ago this reliance upon abstractions came gradually to be replaced by reliance upon evidence as to actual economic and social needs. In other words, to borrow Professor Frankfurter's phrase,

[48] Courts and Legislation, 7 Amer. Pol. Sci. Rev. 361; Mechanical Jurisprudence, *supra*.

the courts began to inject *"realism"* into our constitutional law,[49] and began to act upon the idea that the question whether legislative control of social and economic conditions was forbidden by the Fourteenth Amendment might depend upon how acute was the actual need for such control. And this question, of course, was largely one of fact, and not of abstract legal theory. In short, the courts came to recognize that their function in passing upon such questions obliged them to assume the role of social and economic experts.

There is not space to discuss in detail why this change of front took place. But perhaps the most potent cause was the influence of a little group of people who combined accurate legal knowledge with an insight into modern social conditions and who conceived the idea of presenting to the court the actual evidence to prove that legislative regulation of social and economic conditions was vitally necessary and for that reason constitutionally legitimate.[50] The names most conspicuous in this group are those of Mr. Brandeis,[51] Miss Josephine Goldmark,[52] and Professor Frankfurter.[53] When the case of *Muller* v. *Oregon*[54] came before the Supreme Court in 1908, Mr. Brandeis and Miss Goldmark filed their famous brief in support of the Oregon Ten Hour Law for women, setting forth at great length the physiological and social reasons why women needed protection from over-long hours of labor.[55] No intelligent group of men could shut out from their minds the telling force of

[49] Hours of Labor and Realism in Constitutional Law, 29 HARV. L. REV. 353.

[50] There was certainly little in the briefs of counsel in the earlier cases to inspire the courts to take a liberal view of questions of constitutionality in close cases. As Mr. Brandeis expressed it, it was a case of "the blind leading the blind." Living Law, 10 ILL. L. REV. 461, 470.

[51] Mr. Brandeis' services in these cases were given without compensation. He continued actively in this work until his appointment to the Supreme Court in 1916.

[52] Publication Secretary of the National Consumers' League.

[53] Professor of Law in Harvard University. He took up this work when Mr. Brandeis laid it down.

[54] 208 U. S. 412 (1908).

[55] This brief forms Part II of Miss Goldmark's book, Fatigue and Efficiency.

this presentation of facts. The Supreme Court succumbed to it, and in the course of its opinion upholding the statute it said:

> "The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure and the functions she performs in consequence thereof justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. *We take judicial cognizance of all matters of general knowledge.*"[56]

The real importance of this decision was not that a desirable piece of protective labor legislation was upheld, but that in upholding it the court pretty plainly served notice that it approved the novel technique with which the case had been argued.[57] The *Muller* case marks the beginning of a line of cases in which briefs of this new kind were filed and in which social legislation was sustained because the courts showed themselves willing to weigh the social and economic facts which those briefs so clearly set forth.[58] The New York Court of Appeals took its place among the converts to

[56] Italics are the writer's. See also Jacobson v. Massachusetts, 197 U. S. 11 (1905).

[57] Frankfurter, *op. cit.*, 29 HARV. L. REV. 365. See Greeley, Changing Attitude of the Courts Toward Social Legislation, 5 ILL. L. REV. 222.

[58] Ritchie v. Wayman, 244 Ill. 509 (1910); Hawley v. Walker, 232 U. S. 718 (1914); Miller v. Wilson, 236 U. S. 373 (1915); Bosley v. McLaughlin, 236 U. S. 385 (1915); Stettler v. O'Hara, 69 Ore. 519 (1914); same, 243 U. S. 629 (1917); People v. Schweinler Press, 214 N. Y. 395 (1915).

the philosophy of "realism" in the interpretation of the Fourteenth Amendment, and with commendable frankness reversed its earlier decision that the legislative prohibition of women's night work was a violation of due process of law.[59]

"There is no reason," said Judge Hiscock, "why we should be reluctant to give effect to new and additional knowledge upon such a subject as this, even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed. Particularly do I feel that we should give serious consideration and great weight to the fact that the present legislation is based upon and sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation, the present factory investigating commission."

The supreme court of Illinois experienced a similar change of heart, and for similar reasons, in respect to a ten-hour law for women.[60]

While this change of attitude upon the part of the courts was not sudden nor universal, it came by degrees to be fairly representative of the modern judicial position. It involved two things. It involved, first, a square recognition by the courts that the constitutionality of social and economic legislation depended in the last analysis upon the actual existence or non-existence of social or economic conditions justifying such legislation. In other words, the old mechanical "jurisprudence of concepts" gave way to what Dean Pound has called a "sociological jurisprudence."[61] In the second place, it resulted in throwing the burden of proof back onto the shoulders of those who attacked the constitutionality of these laws in most of the cases where any positive justification based on facts was presented to the courts. Thus, in the case of *State* v. *Bunting,* in which the Oregon Ten Hour Law was sustained, we find the Oregon supreme court, after commenting upon the social and economic data contained in Professor Frankfurter's and Miss

[59] People v. Schweinler Press, 214 N Y. 395, 412 (1915).

[60] Ritchie v. Wayman, 244 Ill. 509 (1910).

[61] The Need of a Sociological Jurisprudence, 19 GREEN BAG, 607; The Scope and Purpose of Sociological Jurisprudence, 24 HARV. L. REV. 591, and 25 HARV. L. REV. 140, 489.

Goldmark's elaborate brief, declaring:[62] "In order to warrant declaring the act violative of the fundamental law, it should be shown that in the light of the world's experience and common knowledge the act under consideration is palpably and beyond reasonable doubt one that will not tend to protect or conserve the public peace, health, or welfare in its enforcement." And this statement accurately reflects the view taken in numerous decisions handed down during the period under discussion.[63]

It seems to the writer that this third phase of the judicial attitude respecting the construction of the Fourteenth Amendment may be summarized thus: The courts did not cease to be the active arbiters of the validity of social and economic legislation, but they did adopt the policy of deciding the question of that validity upon the basis of social and economic facts. Legislative determinations still received somewhat meager respect of their own weight, but whenever any substantial factual basis for the legislation could be found either in evidence actually presented or in a consensus of public opinion shared by the court the burden of proof was placed squarely upon the shoulders of those who attacked the statute.

IV. The Present Movement Toward Judicial Self-denial—Social and Economic Question Left for Legislative Determination

An examination of the decisions of the courts, especially of the Supreme Court of the United States during the last few years, shows the growth of an even more liberal attitude toward social and economic legislation than that just discussed. There is danger of over-emphasizing the extent of this change. Every now and then there occurs a recrudescence of the old dogmatic legalism which raises the question whether this new judicial attitude may not, after all, be merely the product of an optimistic imagination.[64] We

[62] 71 Ore. 259, 272 (1914).

[63] "The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation." Erie R. Co. v. Williams, 233 U. S. 685 (1914).

[64] See the opinion of Chief Justice Taft in the recent case of Truax v. Corrigan, Adv. Opin., Oct. Term, 1921, 132.

may, however, examine its essential nature and what evidence there is of its reality.

Many of the recent cases seem to reflect what may be called an attitude of judicial self-denial or *laissez faire,* a willingness on the part of the courts to regard the legislative determination that social and economic conditions demand statutory regulation as a conclusive determination with which the courts will interfere only in cases of the most obvious and palpable abuse of discretion. This sounds, of course, very much like the old orthodox doctrine that laws are presumed to be valid until proved beyond reasonable doubt to be otherwise. But closer scrutiny will reveal substantial practical, if not theoretical, differences. The true significance of this new judicial attitude may best be made by showing its relation to its predecessors. It was a great gain to have the courts recognize that the validity of social and economic legislation depended primarily upon questions of social and economic fact. But this attitude of realism merely changed the standards in accordance with which the courts decided those questions of legislative validity. Instead of testing social and economic legislation by abstract, legalistic standards, they tested it by what knowledge they had of social and economic facts. They welcomed the presentation of those facts and treated any evidence regarding them with great respect. But it was the court itself, assuming the role of social and economic experts, which decided whether the facts existed and whether the legislative exercise of the police power was more burdensome or restrictive than the actual conditions warranted.

Now the new attitude which the courts show some signs of adopting differs from this position in this respect: The courts are coming to recognize that the question whether social and economic conditions warrant certain kinds of social legislation is not a question of law, as was at first assumed; nor a question of pure fact, as was later assumed, but a question of opinion. It is a question which cannot be answered dogmatically yes or no; it is a question upon which honest and sensible people will inevitably differ. This question of opinion regarding the existence of social and economic conditions or the actual necessity for remedial measures is not the business of the courts to settle; that decision is for the legislature. And unless it can be shown by a preponderance of evidence that

the opinion of the legislature as to the need for social or economic legislation is one which no reasonable and honest person could form, that legislative determination is binding and conclusive upon the courts. In other words, the question before the court is very like the question presented to the judge who is asked to set aside the verdict of a jury as being contrary to the weight of evidence; that question is not, does the judge agree with the jury's verdict, but is the verdict so palpably wrong that reasonable men could not have reached it?[65] And so the question here is not, does the court agree that the social and economic legislation is warranted by the conditions, but could reasonable men have concluded that it was? The proper sphere of legislative regulation of social and economic conditions ceases to be defined in accordance with judicial tests of reasonableness and becomes, to use the words of Professor Vance, "substantially commensurate with the considered legislative policy of the state."[66]

It would be a great mistake to assume that this change in attitude on the part of courts has been of sudden origin, although the currency which it has attained is in the main a fairly recent development. Traces of it are to be found, however, in judicial opinions written thirty years ago. Perhaps its chief exponent is Mr. Justice Holmes; and it has formed one of the chief planks in his philosophy of constitutional construction ever since he first held judicial office.[67] Little by little views first voiced by him in dissenting opin-

[65] Thayer, Law and Fact in Jury Trials, 4 HARV. L. REV. 167, 168; CASES ON CONSTITUTIONAL LAW, I, 672; LEGAL ESSAYS, 20-24.

[66] Coal Mining Affected with a Public Interest, 31 YALE L. JOUR. 75.

[67] In 1891 the Supreme Court of Massachusetts invalidated a law forbidding employers to impose fines on employees for defective work, on the ground that it violated the clause of the Massachusetts Constitution securing to all the right of "acquiring, possessing and protecting property." Mr. Justice Holmes dissented in the following language: "It might be urged, perhaps, that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unnecessary. If I assume that this construction of the Constitution is correct, and that, speaking as a political economist, I should agree in condemning the law, still I should not be willing or think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible or pretty nearly so. * * * I suppose that this act was passed because the operatives, or some of them, thought that they were often cheated out of part

ions have earned wider acceptance and are today being applied and extended in a way which three decades ago it would have seemed rash to predict.[68]

There is space to mention only a few of the more interesting cases in which this new attitude of the courts is exemplified or suggested. We find in the Supreme Court, for example, a growing tendency to treat as conclusive the legislative determination that police regulations are warranted by existing social conditions, especially if the state courts have upheld the law. In the case of *Noble State Bank* v. *Haskell,* in which the Supreme Court sustained the Oklahoma law establishing the guarantee of bank deposits, Mr. Justice Holmes, speaking for the court, said:[69]

"It may be said in a general way that the police power extends to all the great public needs. * * * It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. * * * If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. * * * In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation,

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of their wages under a false pretense that the work done by them was imperfect, and persuaded the legislature that their view was true. If their view was true, I cannot doubt that the legislature had the right to deprive the employers of an honest tool which they were using for a dishonest purpose, and I cannot pronounce the legislation void, as based on a false assumption, since I know nothing about the matter one way or another." Commonwealth v. Perry, 155 Mass. 117, 124 (1891). See Frankfurter, The Constitutional Opinions of Justice Holmes, 29 HARV. L. REV. 683; Dobyns, Justice Holmes and the Fourteenth Amendment, 13 ILL. L. REV. 71.

[68] He still finds himself dissenting, however, as in the case of Truax v. Corrigan, *supra,* in which he said: "The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now. * * * Delusive exactness is a source of fallacy throughout the law. * * * I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect" (page 158).

[69] 219 U. S. 104, 111 (1911).

inspection and the above described coöperation are necessary safeguards, this court certainly cannot say that it is wrong."

In 1915 an Illinois statute forbidding the sale of food preservatives containing boric acid was held by the Supreme Court not to violate the guarantees of the Fourteenth Amendment.[70] "The contention of the plaintiff in error," said Mr. Justice Hughes, "could be granted only if it appeared that by a consensus of opinion the preservative was unquestionably harmless with respect to its contemplated uses; that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided."

In sustaining a state statute prohibiting the trading-stamp business against the charge that it was class legislation which denied the equal protection of the law, the court said:[71] "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed."

This position has been assumed even more strikingly in recent cases in which the courts have had to determine whether certain businesses were so affected with a public interest that legislative regulation could be supported, or whether taxes were being spent for a public purpose. The tendency to treat the legislative conclusions more and more as conclusive seems apparent. In *German Alliance Insurance Co.* v. *Lewis,* decided in 1914,[72] the court alluded to the fact that the state legislatures throughout the country had come to regard the business of insurance as affected with a public interest. "A conception so general," said the court, "cannot be without cause. The universal sense of a people cannot be acci-

[70] Price v. Illinois, 238 U. S. 446, 452 (1915).

[71] Rast v. Van Deman, 240 U. S. 342, 357 (1916).

[72] 233 U. S. 389, 412 (1914).

dental; its persistence saves it from the charge of unconsidered impulse." And we are not surprised to find the court adopting the legislative view. In the recent cases sustaining the legislative control of rents and housing during the war-time emergency, we find this same point of view very strongly suggested. Judge Hough of the United States district court in New York, after commenting upon the doctrine of public user announced in the *German Alliance Insurance Co.* case, went on to say:[73] "Since this pronouncement, and its legitimate and logical sequel, the 'trading stamp' case, it may be and has been asserted that any business is affected with a public interest as soon as the electorate become sufficiently interested in it to pass a regulatory statute. It is not necessary to go so far, but we must and do hold that the business of renting out living space is quite as suitable for statutory regulation, is as much affected with a public interest, as fire insurance and trading stamps."

And in discussing the alleged discriminatory features of the law Judge Hough declared bluntly: "If the power of classification by the legislature was ever judicially limited, the effort has been abandoned, unless some limitation can be found in the statement that a distinction is arbitrary where no 'state of facts reasonably can be conceived that would sustain it.'"

When the housing legislation came before the Supreme Court, Mr. Justice Holmes, speaking for the court, declared:[74] "No doubt it is true that a legislative declaration of facts that are material only as a ground for enacting a rule of law, for instance that a certain use is a public one, may not be held conclusive by the courts. * * * But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. *That the emergency declared by the statute did exist must be assumed.*"[75]

And in the case of *Green* v. *Frazier,* decided in 1920, the Supreme Court, in upholding the Non-partisan League program in North Dakota against the claim that it involved taxation for a private purpose, stated that "what was or was not a public use was a ques-

[73] Marcus Brown Holding Co. v. Feldman, 269 Fed. 306, 317 (1920).

[74] Block v. Hirsh, 65 L. Ed. Sup. Ct. Rep, 531, 532 (1921).

[75] Writer's italics.

tion concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment; and particularly that the judgment of the highest court of the state, declaring a given use to be public in its nature, would be accepted by this court unless clearly unfounded."[76]

The writer is aware that there is nothing particularly revolutionary in any of these statements. Viewed separately, their importance seems slight. Their significance is cumulative. They give evidence of a growing willingness on the part of the court to regard social and economic legislation as constitutional unless some palpable and egregious defect in it be visible. More and more reliance is being placed upon the correctness of legislative determination. As contrasted with earlier decisions, these recent opinions are to be distinguished perhaps only by the degree of respect accorded the legislature. But differences of degree sometimes are substantial enough to amount to differences of kind; and an examination of the cases has convinced the writer that a movement towards a new judicial attitude toward the social and economic interpretation of the Fourteenth Amendment has clearly set in.

It merely remains to evaluate this new attitude of the courts. Is it a weak-kneed abdication of a judicial authority which ought to be exercised? Or is it a wholesome return to a sound appreciation of the proper sphere of judicial action? This is a question about which men will, of course, disagree vigorously. It seems to the writer, however, that the new movement is wise and salutary.

It represents, in the first place, a wholesome readjustment of the relations which ought to exist and which always should have existed between the courts and the legislatures. By regarding the findings of the legislature upon questions of social and economic fact as conclusive in the absence of some flagrant abuse of discretion, the courts abandon the position of trying to settle questions of social and economic policy, which they are wholly unfitted to settle, and leave those questions, together with the responsibility for their solution, where it belongs, upon the legislatures. In the second place, such a readjustment as this would help immeasurably in building up again that popular confidence in the courts which we have seen has been to some extent lost. Finally, it would greatly aid in

[76] 253 U. S. 233 (1920).

rehabilitating the feeble sense of responsibility which legislators assume in respect to the constitutionality of the laws they pass.

By the firm establishment of such a salutary judicial tradition as this new attitude of the courts bids fair to establish, the writer believes that we would correct the only actual defects which have ever existed in our system of judicial review, and we would correct them without resorting to any of the more radical and questionable devices, such as the recall of judges or decisions, which have from time to time been proposed.[77]

University of Minnesota. ROBERT EUGENE CUSHMAN.

[77] "When the lawyer refuses to act intelligently, unintelligent application of the legislative steam-roller by the layman is the alternative." Pound. The Spirit of the Common Law, preface xiv.